In the District Court of the United States for the Western District of New York

CIVIL ACTION NO. 223

UNITED STATES OF AMERICA, PLAINTIFF

v.

SCHINE CHAIN THEATERS, INC. ET. AL., DEFENDANTS

STATEMENT OF THE UNITED STATES OPPOSING JURISDICTION OF THE SUPREME COURT AND MOTION TO DISMISS OR AFFIRM

This is an appeal from an amended judgment of the United States District Court for the Western District of New York, entered on March 29, 1946, which granted injunctive relief under Section 4 of the Sherman Act as to various unlawful trade practices and conspiracies found to have been employed by a group of corporations and individuals operating motion picture theatres. The defendants were also found to have violated Sections 1 and 2 of the Sherman Act by monopolizing theatre operations in numerous towns ranging in population from 5,000 to 35,000, and the judgment further provides that "the defendants and their affiliated corporations be dissolved, realigned, or reorganized in their ownership and control so that fair competition between them and other theatres may be restored and thereafter maintained."

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As originally entered on October 31, 1945, this provision, designated in both the original and amended judgments as Section III, contained two additional sentences giving each side sixty days from that date to submit to the Court such plans as they thought appropriate to carry out this provision, and thirty days after service of such plans in which to file written objections or such counter or substitute proposals as they might care to submit. On February 25, 1946, timely motions to amend the findings and judgment previously made by both sides were heard, at which hearing the Court refused a request of the defendants to postpone consideration of any plan to effectuate Section III of its judgment until the defendants' appeal to this Court had been disposed of. A plan to effectuate Section III had then been filed by the plaintiff, but no plan was filed by defendants. The Court ordered them to file their objections to plaintiff's plan by March 25, 1946, and set the plan and objections for hearing on April 16, 1946. Their objections were filed on April 1, 1946, pursuant to a stipulated extension.

On March 11 the Court filed an opinion disposing of the motions to amend the findings and judgment, which resulted in the entry of the amended judgment on March 29, here appended. At the hearing on April 16 defendants' counsel obtained leave of the Court to file a tentative plan on May 7 and to file a reply by that date to a reply filed by the Government on April 12 to the

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objections filed by the defendants on April 1. On May 7 defendants filed a tentative plan and a memorandum replying to plaintiff's reply. At the same time the Court requested plaintiff to comment on this tentative plan by May 20 and set May 28 as the date on which it would consider the defendants' tentative plan and the plaintiff's comments thereon. Plaintiff filed its comments on the defendants' plan with the Court on May 16. On May 28 the defendants filed a motion for leave to submit evidence on this issue before the Court or a master, which was taken under advisement.

No further proceedings had occurred at the time this statement was prepared.

Jurisdiction of the appeal is invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C., Sec. 29. See also Section 238 of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C., Sec. 345.

ARGUMENT

This case involves appeals from Section II of the judgment, which contains the injunctive provisions, and Section III, which contains the soon-to-be-implemented general direction for divestiture. As to the latter, we think the appeal premature, both because Section III is not a "final decree" within the meaning of the Expediting Act, and because, in the alternative, the Court should in its discretion refuse to hear an appeal from such a general instruction when a judgment

embodying a specific plan is presently being considered by the lower court.

Since the injunctive provisions of Section II are to be considered in relation to the judgment as a whole, appeal as to them may also be premature. Assuming that this portion of the judgment is properly before the Court, however, it raises no substantial issue not determined by this Court in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, and could appropriately be affirmed on motion without further review. This will appear from the opinion and findings of Judge Knight, which are amply supported by the evidence in the transcript of record.

The Expediting Act (15 U. S. C. 29) authorizes appeals to the Supreme Court from any "final decree" of a district court in a civil proceeding brought by the United States to enforce the Sherman Act. In this case, there is as yet no "final decree" within the meaning of this Act as to Section III of the judgment, although proceedings are pending which should soon result in the entry of a judgment which will have finality for appellate purposes.

In this case the crux of the judgment will be the plan adopted to implement Section III. A temporary consent order was entered in this case on May 19, 1942, which made effective injunctive provisions pending a continuance of the case, which are similar to those now embodied in Section II of the judgment. The temporary consent

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order also provided for the divestiture of all theatres acquired by the defendants during the pendency of the suit and a stay of further acquisitions without Court approval.

The only question of substance which will be presented on appeal from the final judgment entered in this case will be the extent and character of relief granted pursuant to Section III of the judgment. That section is now in a form so abstract that it requires no action or inaction of any kind on the part of any defendant. Judgments which on their face are merely preparatory to the entry of a further order granting relief in concrete terms are not appealable prior to the entry of such further orders. *Green* v. *Fisk*, 103 U. S. 518; *Keystone Iron Co.* v. *Martin*, 132 U. S. 91. Until the district court has acted upon the plans now before it to implement Section III of the judgment, this Court will not have before it a final expression of the view of the district court as to what constitutes adequate relief in this case.

In *United States* v. *Eastman Kodak Co.*, 255 U. S. 578, the defendants appealed from a judgment of divestiture which was to be supplemented by the filing of a plan, but the general nature and extent of the divestiture ordered had been clearly specified in the judgment pursuant to plans previously submitted by both parties in accordance with procedure outlined in the district court's opinion. In that case the United States did not question this Court's jurisdiction of the appeal.

There was no ruling on the question by this Court since the appeal was dismissed on the appellants' motion. Apart from this case we know of no instance in which a Sherman Act defendant has sought to appeal from a judgment of divestiture or dissolution pending adoption by the district court of a plan to put it into effect.

The present appellants will undoubtedly appeal from the final judgment entered pursuant to Section III of the judgment now in effect and the United States might also appeal from such final judgment if it felt that the final judgment failed to give adequate relief. Obviously the present appeal, if it is to be entertained by this Court, should be heard and determined together with any such later appeals.

For the reasons previously stated, it is respectfully submitted that the appeal should be dismissed as premature or, in the alternative, dismissed as to Section III and the judgment affirmed as to Section II. If the Court should be of the opinion that it has probable jurisdiction, we suggest that the hearing of the argument should be postponed until there come before the Court such appeal or appeals as may be taken from the further judgment entered by the district court to effectuate Section III of its judgment.

[S] J. HOWARD MCGRATH,
Solicitor General.

MAY 29, 1946.

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